Fung Beng Tiat v Marid Construction Co

FEDERAL COURT (CIVIL APPEAL) — SUPREME COURT CIVIL APPEAL NO 02-354-1992
ANUAR CJ (MALAYA), MOHD AZMI FCJ AND GOPAL SRI RAM JCA
24 APRIL 1996

Bankruptcy *— Petition — Opposition to petition — Proper court to present petition — Debtor was resident in Sabah for one year preceding presentation of petition — Creditor presented petition in High Court of Kuala Lumpur — Whether fatal — Whether proceedings could be transferred to Sabah after the making of the receiving and adjudication orders — Bankruptcy Act 1967 ss 5(1)(d), 93(7) & 131 — Bankruptcy Rules 1969 r 101(1) & (2) — Courts of Judicature Act 1964 — Federal Constitution art 121*

Bankruptcy *— Petition — Opposition to petition — Territorial jurisdiction — Debtor was resident in Sabah for one year preceding presentation of petition — Creditor presented petition in High Court of Kuala Lumpur — Whether proper court to file petition — Whether doctrine of submission to jurisdiction relevant — Bankruptcy Act 1967 ss 5(1)(d), 93(7) & 131 — Bankruptcy Rules 1969 r 101(1) & (2) — Courts of Judicature Act 1964 — Federal Constitution art 121*

Civil Procedure *— Jurisdiction — High Court of Malaya distinct from High Court of Borneo — Territorial jurisdiction — Whether proceedings in High Court in Malaya could be transferred to High Court in Sabah and Sarawak or vice versa — Courts of Judicature Act 1964 — Federal Constitution Art 121*

On 18 March 1991, the respondent ('the creditor') caused to be issued from the registry of the High Court at Kuala Lumpur a bankruptcy notice for the judgment sum of RM337,812.25 to the appellant ('the debtor'). That notice was duly served upon the debtor who made no response to it. The debtor had thus committed an act of bankruptcy by the terms of the Bankruptcy Act 1967 ('the Act'), and the creditor presented a petition against the debtor. The debtor filed and served a notice of intention to oppose the petition. When the petition came for hearing, the debtor's counsel resisted the petition. It was argued that the creditor ought to have presented his petition in the High Court in Sabah and not in the High Court in Malaya pursuant to r 101(1) and (2) of the Bankruptcy Rules 1969 ('the Rules'), because the debtor was, for the one year preceding the presentation of the petition, not resident in Kuala Lumpur or in any other state within Peninsular Malaysia but an ordinarily resident in Sandakan, Sabah. Counsel for the creditor argued, inter alia, that: (i) the debtor by engaging counsel in Kuala Lumpur had submitted to the jurisdiction of the High Court in the capital city; (ii) it was open for the creditor to present its petition in any state within the Federation and that the proceedings could, after the making of the receiving and adjudication orders, be transferred to the state in which the debtor was resident pursuant to ss 5(1)(d), 93(7) and 131 of the Act; (iii) s 131 operated to save the petition in any event as the alleged defect or irregularity did not occasion any injustice to the debtor. These arguments found favour with the judge who dismissed the

notice to oppose and adjourned the petition to another date for hearing. The debtor appealed against the order of dismissal.

Held, allowing the appeal:

(1) It is crystal clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory. There is no Federal legislation that confers power upon the one High Court to transfer proceedings to the other (see p 419G); *Sykt Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 followed.

(2) The expression 'State' appearing in the Act must be interpreted in the light of the Federal Constitution and the Courts of Judicature Act 1964. There is nothing in the Act of 1967 or the Rules of 1969 that demonstrates an intention on the part of Parliament to create an exception in bankruptcy cases. It follows that when s 93(7) of the Act speaks of transferring proceedings from one State to another, it refers to a State within the territorial jurisdiction of the respective High Courts (see p 420C–D).

(3) The judge erred in failing to recognize the fact pattern before him as disclosing a point of territorial jurisdiction in the sense this court had earlier discussed, and that accordingly, s 131 had no application to the case (see p 420G); *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 followed.

(4) The doctrine of submission to jurisdiction, which is part and parcel of private international law, applies to jurisdiction that a court has over a particular litigant, and has nothing whatsoever to do with the territorial authority of a court. The expression 'jurisdiction' is one that takes its colour from its context, and for that reason, great care must be taken in its use to the facts of a particular case. Once it is recognized that what was in issue was territorial jurisdiction, then there could arise no question of a submission. Jurisdiction in the sense in which it applies in the present case cannot be conferred by consent or waiver. The judge was quite wrong when he thought otherwise (see p 421D–E).

[Bahasa Malaysia summary

Pada 18 Mac 1991, penentang ('pemiutang') telah menyebabkan notis kebankrapan dikeluarkan daripada pejabat pendaftaran Mahkamah Tinggi Kuala Lumpur untuk jumlah penghakiman sebanyak RM337,812.25 terhadap perayu ('penghutang'). Notis tersebut telah disampaikan kepada penghutang tetapi penghutang tidak mengambil apa-apa tindakan. Penghutang dengan itu telah

melakukan tindakan kebankrapan di bawah terma Akta Kebankrapan 1967 ('Akta tersebut'), dan pemiutang telah mengemukakan suatu petisyen terhadap penghutang. Penghutang telah memailkan dan menyampaikan notis untuk membantah petisyen itu. Semasa petisyen itu dibicarakan, peguam penghutang menentang petisyen itu. Beliau berhujah bahawa pemiutang sepatutnya mengemukakan petisyennya di Mahkamah Tinggi di Sabah dan bukannya Mahkamah Tinggi di Malaya seperti yang dikehendaki oleh k 101(1) dan (2) Kaedah-Kaedah Kebankrapan 1969 ('Kaedah tersebut'), kerana setahun sebelum tarikh petisyen itu dikemukakan, penghutang tidak menetap di Kuala Lumpur atau di mana-mana negeri di Semenanjung Malaysia, tetapi dia biasanya menetap di Sandakan, Sabah. Peguam pemiutang menghujahkan, antara lain, bahawa: (i) penghutang mendapatkan peguam di Kuala Lumpur dan dengan itu telah menyerah kepada bidang kuasa Mahkamah Tinggi di ibu kota; (ii) pemiutang boleh mengemukakan petisyennya di mana-mana negeri dalam Persekutuan dan prosiding boleh dipindahkan ke negeri di mana penghutang menetap mengikut ss 5(1)(d), 93(7) dan 131 Akta tersebut, selepas perintah penerimaan dan penghukuman dibuat; (iii) s 131 telah beroperasi untuk menyelamatkan petisyen itu dalam apa keadaan sekalipun kerana kecacatan atau luar aturan yang dikatakan itu tidak menyebabkan apa-apa ketidakadilan kepada penghutang. Hujah ini dipersetujui oleh hakim yang telah menolak notis bantahan dan menangguhkan petisyen itu kepada tarikh pembicaraan yang lain. Penghutang merayu terhadap perintah penolakan itu.

Diputuskan, membenarkan rayuan itu:

(1) Adalah jelas daripada fasal 121 Perlembagaan Persekutuan bahawa ada dua Mahkamah Tinggi yang berasingan di Malaysia yang menjalankan bidang kuasa wilayah yang berbeza ke atas kawasan geografi yang berbeza di negara ini. Terdapat Mahkamah Tinggi di Malaya dan terdapat Mahkamah Tinggi di Sabah dan Sarawak. Masing-masing mempunyai bidang kuasa ke atas pertikaian yang timbul di dalam wilayah sendiri. Tiada perundangan Persekutuan yang memberikan kuasa kepada satu Mahkamah Tinggi untuk memindah prosiding ke Mahkamah Tinggi yang lain (lihat ms 419G); *Sykt Nip Kui Cheong Timber Contractor v General Insurance Co Sdn Bhd* [1975] 2 MLJ 115 diikut.

(2) Ungkapan 'Negeri' yang muncul dalam Akta tersebut mesti ditafsirkan dengan mengambil kira Perlembagaan Persekutuan dan Akta Mahkamah Kehakiman 1964. Tiada apa-apa dalam Akta 1967 atau Kaedah-Kaedah 1969 yang menunjukkan bahawa Parlimen bertujuan untuk memberi pengecualian kepada kes-kes kebankrapan. Oleh itu, apabila s 93(7) Akta tersebut menyebut tentang pemindahan prodising dari satu negeri ke negeri yang

lain, ia merujuk kepada negeri dalam bidang kuasa wilayah Mahkamah Tinggi masing-masing (lihat ms 420C–D).

(3) Hakim telah membuat kesilapan kerana gagal mengesan fakta-fakta yang dikemukakan kepadanya yang mengandungi isu bidang kuasa wilayah mahkamah seperti yang telah diperbincangkan oleh mahkamah ini, dan dengan itu s 131 tidak terpakai dalam kes ini (lihat ms 420G); *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 diikut.

(4) Doktrin penyerahan kepada bidang kuasa, yang merupakan inti pati undang-undang antarabangsa persendirian, adalah dipakai untuk menentukan bidang kuasa yang dipunyai oleh sesebuah mahkamah ke atas seseorang litigan, dan ia tidak ada kena mengena dengan bidang kuasa wilayah mahkamah. Ungkapan 'bidang kuasa' adalah terpakai di dalam konteksnya sendiri, dan dengan itu, perhatian harus diambil dalam penggunaannya dalam sesuatu kes. Setelah dikenalpasti bahawa apa yang dibincangkan ialah mengenai bidang kuasa wilayah, maka tidak ada persoalan mengenai penyerahan yang timbul. Bidang kuasa seperti yang terpakai dalam kes ini tidak boleh diberi melalui keizinan atau penepian. Hakim tersebut telah melakukan kesilapan apabila beliau berpendapat sebaliknya (lihat ms 421D–E).]

Notes

For cases on bankruptcy petitions, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1486–1531.

For a case on territorial jurisdiction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 2176.

Cases referred to

Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191

Sykt Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd [1975] 2 MLJ 115

Legislation referred to

Bankruptcy Act 1967 ss 5(1)(d), 93(7), 131

Bankruptcy Rules 1969 r 101(1), (2)

Courts of Judicature Act 1964

Federal Constitution art 121

Appeal from: Bankruptcy No D4–29–1264–1991 (High Court, Kuala Lumpur)

Richard Lee Wen Gee (*Cheah Teh & Su*) for the appellant.

Chia Wen Chow (*KB Chua & Co*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal raises a short but important point relating to the law governing personal insolvency. We heard this appeal on 22 April 1996, and, at the conclusion of arguments, allowed it. Our reasons for doing so now follow.

The relevant facts may be shortly stated, and we will, for convenience, refer to the respondent as 'the creditor' and the appellant as 'the debtor' respectively.

On 13 February 1990, the creditor obtained judgment against the debtor in the sum of RM337,812.25. Acting on this judgment, the creditor, on 18 March 1991, caused to be issued from the registry of the High Court at Kuala Lumpur, a bankruptcy notice for the judgment sum. That notice was duly served upon the debtor who made no response to it. By the terms of the Bankruptcy Act 1967, which is the law governing personal insolvency, the debtor committed an act of bankruptcy. This entitled the creditor to present a petition to have the debtor adjudicated as a bankrupt.

On 10 June 1991, the creditor presented a petition against the debtor. Paragraph 1 of that petition reads as follows:

> That the said debtor is domiciled in the Federation or in any state or within one (1) year before the date of presentation of the petition has ordinarily resided in the State of Sabah and has an address for service at Malayan Banking Bhd Sandakan Branch, 48, Jalan Tiga, 90000 Sandakan Sabah.

On 8 July 1992, the debtor filed and served a notice of intention to oppose the petition. The petition came for hearing before a judge on 17 July 1992. The debtor appeared by counsel and resisted the petition. After hearing arguments, the learned judge dismissed the notice to oppose and adjourned the petition to another date for hearing. It is against the order of dismissal that the present appeal has been brought.

In the court below, counsel for the debtor relied on r 101 of the Bankruptcy Rules 1969, sub-rules (1) and (2) of which read as follows

> 101(1) The petition shall be filed in the Court in which it is to be presented.
>
> (2) Where the debtor has for the greater part of one year immediately preceding the presentation of the petition carried on business in one State and resided in another State the petition shall be filed in the Court of the State in which he has carried on business.

It is common ground that the debtor was, for the one year preceding the presentation of the petition not resident in Kuala Lumpur or in any other State within Peninsular Malaysia. He was in fact ordinarily resident in Sandakan, in the State of Sabah during the relevant period. Based upon these undisputed facts, counsel argued that the creditor ought to have presented his petition in the High Court in Sabah and not in the High Court in Malaya.

Counsel for the creditor argued that the petition had been properly presented before the High Court at Kuala Lumpur. He said that the debtor, by engaging counsel in Kuala Lumpur had submitted to the jurisdiction of the High Court in the capital city. He referred the learned

judge to ss 5(1)(d), 93(7) and 131 of the Bankruptcy Act 1967 which provide as follows:

> 5(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
>
> (d) the debtor is domiciled in the Federation or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in the Federation or has carried on business in the Federation personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in the Federation by means of a partner or partners or an agent or manager.
>
> 93(7) Where the debtor is proved to be resident in a State other than the State in which a petition under this Act is presented, the court may upon application duly made in that behalf order the transfer of the proceedings to the court of the State in which the debtor resides, at any time before or after the making of a receiving order against the debtor.
>
> 131 No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Relying upon these provisions, counsel for the creditor argued that it was open for his client to present its petition in any State within the Federation and that the proceedings could, after the making of the receiving and adjudication orders, be transferred to the State in which the debtor was resident. He also argued that s 131 operated to save the petition in the instant case as the defect or irregularity, if any, did not occasion any injustice to the debtor.

These arguments found favour with the learned judge who, after a consideration of the statutory provisions above-quoted, said:

> Since the judgment debtor is residing and carrying on business in Sabah one year before the presentation of the petition, he is therefore residing and carrying on business in the Federation. The judgment creditor was therefore entitled to file the bankruptcy petition against the debtor.
>
> It is true that in the present case there has been a failure to comply with r 101(1) and (2). In my opinion the failure to comply with r 101(1) and (2) is only an irregularity and such irregularity does not cause substantial injustice to the judgment debtor.
>
> Firstly when the creditor's petition came up for hearing on 7 February 1992, the debtor was represented by his counsel. At the request of his counsel the court adjourned the matter to 17 April 1992 for mention pending the settlement of the matter. On 17 April 1992 he was again represented by his counsel and at his request the matter was again adjourned pending settlement of the matter. On both occasions he did not raise any objection on the question of jurisdiction. It was only on 11 July 1992 that

A he filed the present notice of intention to oppose. It can be concluded therefore that the fact that his counsel appeared on two previous occasions with the view of settling the matter, shows that, to borrow the words of the learned Judge in *Wee Chow Yong* case, [the reference here is to *Wee Chow Yong (t/a Vienna Music Centre) v Public Finance Bhd* [1989] 3 MLJ 508] he had condoned the breach.

B Secondly even if he had earlier raised an objection on the question of jurisdiction on the ground that there had been non-compliance with r 101(1) and (2) the court has the discretion either to transfer the case to Sabah before or after making a receiving order. The power of the court to exercise its discretion as to whether to transfer the case to another State is provided in s 93(7) of the Bankruptcy Act.

C ...

The word 'State' is not defined in the Bankruptcy Act. The Interpretation Act 1967 defines 'State' to mean a State of Malaysia. It is clear, therefore that under s 93(7) the court has the discretion to transfer a bankruptcy proceeding from the High Court in Malaya to the High Court in Borneo and vice versa.

D In the light of the provision in s 93(7), any irregularity in a bankruptcy proceeding by reason of non-compliance with r 101(1) and (2) cannot be said to cause substantial injustice to the judgment debtor. If the judgment debtor does not want the proceeding to be held in the High Court in Kuala Lumpur, he is at liberty to apply to the court that the proceeding be transferred to Kota Kinabalu.

E For the reasons given above, I dismiss the notice of intention to oppose the petition with costs.

Before us, counsel for the debtor repeated the submissions made in the court below. Having heard argument, we are, with respect, unable to agree F with the learned judge's reasons for dismissing the debtor's opposition.

First, it is crystal clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory. As presently G advised, there is absent in any Federal legislation that confers power upon the one High Court to transfer proceedings to the other.

This bifurcation of territorial jurisdiction was dealt with by Hashim Yeop A Sani J (later Chief Justice, Malaya) in *Sykt Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd* [1975] 2 MLJ 115. H His Lordship observed that:

[I]t is all too clear that both the High Court in Malaya and the High Court in Borneo have separate and distinctive territorial jurisdiction. Article 121(1) of the Constitution speaks of the two High Courts having 'co-ordinate jurisdiction' and the definition of 'local jurisdiction' in the Courts of I Judicature Act 1964 speaks of the territorial jurisdiction of each of the two High Courts. Section 7(2) of the 1964 Act should not be misconstrued for what that subsection does is simply to get around the provision of O 11 Rule 1 of the Rules of the Supreme Court 1957 for convenience for otherwise

unnecessary difficulties will arise in the process of the courts within Malaysia. The enactment of s 7(2) of the 1964 Act itself would strengthen the argument that the framers of the 1964 Act recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia.

Second, the cases referred to by the learned judge in his judgment deal with petitions presented at one or more of the branches of the High Court in Malaya.

There is no reported case — indeed counsel on both sides conceded this — where bankruptcy proceedings were transferred from the High Court in Malaya to the High Court in Sabah and Sarawak or vice versa.

The expression 'State' appearing in the Bankruptcy Act 1967 must be interpreted in the light of the Federal Constitution and the Courts of Judicature Act 1964. We are satisfied that there is nothing in the Act of 1967 or the Rules of 1969 that demonstrates an intention on the part of Parliament to create an exception in bankruptcy cases.

It follows, accordingly, that when s 93(7) speaks of transferring proceedings from one State to another, it refers to a State within the territorial jurisdiction of the respective High Courts.

To illustrate, if a petition is presented in the High Court in Malaya at Penang to adjudicate a debtor bankrupt who has always been resident in Alor Setar, then, the former branch of the High Court has a discretion whether to transfer the proceedings to the High Court at Alor Setar or to deal with the petition itself. In the circumstances of the example given, it would be quite open for the former branch of the High Court to refuse a transfer on the ground that no injustice may be occasioned within the context of s 131 of the Bankruptcy Act 1967. Indeed this was the situation in *Wee Chow Yong (t/a Vienna Music Centre) v Public Finance Bhd* [1989] 3 MLJ 508), which so impressed the learned judge when he held against the debtor.

In our judgment, the learned judge erred in failing to recognize the fact pattern before him as disclosing a point of territorial jurisdiction in the sense we have earlier discussed. Had he done so, he would have seen that the s 131 had no application to the case.

We pause to observe that Abu Mansor J in *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191 adopted the correct approach to the question of jurisdiction. Although that was a case which concerned corporate and not personal insolvency, the views there expressed are of relevance to the instant appeal. For present purposes, we find it sufficient to quote from the headnote of the report :

> The respondent company was incorporated on 1 September 1982 and had its registered office in Kuching, Sarawak. The petitioner alleged that the respondent was indebted to the petitioner in the sum of $107,357.66 for the price of goods sold and delivered. On 5 September 1988, the petitioner served on the respondent the statutory notice pursuant to s 218 of the Companies Act 1965 but no payment was received. Hence the petitioner filed the petition to wind up.

A Held, striking out the petition:

(1) The issue of which High Court has jurisdiction over a matter is determined by s 23 of the Courts of Judicature Act 1964. It is clear that the respondent, residing in Kuching, would come under s 23(1)(b) of the Courts of Judicature Act 1964.

B (2) While matters can be heard in any court of the courts of Malaya, it was not the intention of the legislature for any court in Malaya to assume jurisdiction of a mater arising in or which should be filed in a Borneo court. Since the respondent is residing in Kuching, the matter should really be filed in the Borneo High Court, in particular Kuching.

C (3) From the point of view of convenience, Kuching would be more convenient, with the respondent residing there and the witnesses being there.

Finally, we refer to the treatment by the learned judge of the conduct of the debtor in relation to the issue of jurisdiction. In our judgments, the doctrine of submission to jurisdiction, which is really part and parcel of

D private international law, applies to jurisdiction that a court has over a particular litigant, and has nothing whatsoever to do with the territorial authority of a court. The expression 'jurisdiction' is one that takes its colour from its context, and, for that reason, great care must be taken in its use to the facts of a particular case.

The answer to the problem in the present case lies in the observation

E made by Mohd Azmi FCJ during argument that once it is recognized that what was in issue was territorial jurisdiction, then, there could arise no question of a submission. Jurisdiction in the sense in which it applies in the present case cannot be conferred by consent or waiver. The learned judge was quite wrong when he thought otherwise.

F For the reasons given, the appeal was allowed and the order of the learned judge was set aside. The creditor's petition was struck out with liberty to file afresh in the High Court in Sabah. The costs of the appeal and of the proceedings in the court below were awarded to the debtor. The deposit paid into court as security for the appeal was ordered to be

G refunded to the debtor.

Order accordingly.

Reported by Isabel Liong

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